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2 UNITED STATES DISTRICT COURT
3 DISTRICT OF MASSACHUSETTS

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5 IN RE: NEW ENGLAND COMPOUNDING) MDL NO. 13-02419-RWZ
6 PHARMACY CASES LITIGATION)
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13
14 BEFORE: THE HONORABLE RYA W. ZOBEL
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17 **MOTION HEARING**
18

19 John Joseph Moakley United States Courthouse
20 Courtroom No. 12
21 One Courthouse Way
22 Boston, MA 02210
23

24 June 3, 2014
25 9:30 a.m.

Catherine A. Handel, RPR-CM, CRR
Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 5205
Boston, MA 02210
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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Rya W. Zobel, United States District Court Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on June 3, 2014.)

THE COURT: Good morning. Please be seated.

COURTROOM DEPUTY CLERK URSO: Good morning. This is the New England Compound Cases, MD-13-2419.

THE COURT: Would anybody who expects to argue by telephone please identify him or herself.

MR. SEXTON: Your Honor, this is Scott Sexton calling from Roanoke, Virginia.

THE COURT: Do you anticipate arguing?

MR. SEXTON: Yes.

THE COURT: By the way, your affidavit, as it was filed in the Court, is missing Pages 2 and 3.

MR. SEXTON: We filed a corrected declaration hours later, your Honor, and hopefully that was brought to your attention as well.

THE COURT: Well, I'll look it up on the docket. I hadn't looked for a supplement yet.

Okay. So, we have Mr. Sobol for plaintiffs' committee, or whatever you call yourself, and for --

MR. BUSCH: Your Honor, my name is Stephen Busch.

1 I'm with McGuire Woods and I represent Insight Health Corp.,
2 and will be presenting the argument in support of their motion
3 this morning.

4 MR. MATULE: My name, your Honor, is Matthew Matule,
5 Skadden Arps, also on behalf of Insight Health Corp.

6 THE COURT: Your last name?

7 MR. MATULE: Matule, M-a-t-u-l-e.

8 MR. MOLTON: Your Honor --

9 THE COURT: Mr. Sexton, was that for the Roanoke
10 plaintiffs?

11 MR. SEXTON: Yes, your Honor.

12 THE COURT: And, I'm sorry, somebody else announced
13 himself on the telephone.

14 MR. MORIARTY: Matthew Moriarty for Ameridose, your
15 Honor.

16 THE COURT: And whom do you represent?

17 MR. MORIARTY: Ameridose LLC.

18 THE COURT: That's your law firm?

19 MR. MORIARTY: We're Tucker & Ellis LLP, is the law
20 firm.

21 THE COURT: And Ameridose LLC is the client?

22 MR. MORIARTY: Yes, one of the main affiliated
23 defendants.

24 THE COURT: But you don't expect to argue?

25 MR. MORIARTY: It's remotely possible because my

1 client has ten cases in Virginia, but they don't fall under
2 the same procedural category as Mr. Sexton's cases, because
3 the ten --

4 THE COURT: You're the Lipton something firm?

5 MR. MORIARTY: -- are in federal court, not state
6 court.

7 THE COURT: Okay. I think Mr. Busch has the floor
8 since it's his motion that we're hearing first.

9 MR. BUSCH: May it please --

10 THE COURT: There are a number of people who intend
11 to argue. I hope that we can keep this to ten minutes apiece.

12 MR. BUSCH: Thank you, your Honor. I'll certainly
13 endeavor to do that.

14 COURTROOM DEPUTY CLERK URSO: Sir, I'm so sorry, but
15 could you argue at the microphone? Because no one on the
16 telephone can hear you unless you're at the microphone.

17 THE COURT: And you can sit down if you want to do
18 that because the microphones aren't really long enough for
19 standing. I know it's difficult for some lawyers, but try.

20 MR. BUSCH: Very difficult, your Honor, but I'll do
21 my best.

22 THE COURT: We also have Mr. Gottfried.

23 MR. GOTTFRIED: Yes, for the trustee.

24 THE COURT: And for the trustee -- you're not for the
25 trustee?

1 MR. GOTTFRIED: I am for the trustee.

2 THE COURT: You're for the trustee?

3 MR. GOTTFRIED: Yes, your Honor.

4 MR. MOLTON: Your Honor, Mr. Molton, David Molton,
5 for the committee, here with Kiersten Taylor.

6 THE COURT: The creditor's committee?

7 MR. MOLTON: Yes, the creditor's committee. We're on
8 mic now, I understand, your Honor.

9 THE COURT: Okay. And you are here -- I'm sorry.

10 MR. MOLTON: Ms. Taylor is with me for the creditor's
11 committee.

12 THE COURT: Ms. Taylor, okay. All right.

13 Mr. Busch, proceed. I'm sorry.

14 MR. BUSCH: May it please the Court. Again, Stephen
15 Busch on behalf of Insight Health Corporation.

16 We're before the Court on Insight's emergency motion
17 for entry of an order in aid of the Court's decision
18 transferring additional personal injury and wrongful death
19 cases from Roanoke, Virginia and seeking to enjoin the
20 plaintiffs represented by Gentry Locke Rakes & Moore.

21 We seek the Court's intervention caused by ongoing
22 actions by the Gentry Locke law firm representing 18
23 plaintiffs, your Honor, whose cases are pending in the circuit
24 court of the City of Roanoke and that are subject to the
25 trustee's supplemental motion to transfer dated December 27,

1 2013.

2 Your Honor granted the motion to set forth in your
3 memorandum of decision dated May 15th, asserting jurisdiction
4 over those cases and directing that the cases be transferred
5 to MDL-2419 pursuant to 28 --

6 THE COURT: Is the issue that animates your motion
7 the -- I don't know exactly what the status of it is -- the
8 status of motions to dismiss by defendants that were ruled on,
9 but not docketed by the Judge in Roanoke?

10 MR. BUSCH: Your Honor --

11 THE COURT: That's what I understand to be the status
12 of those motions.

13 MR. BUSCH: It is Insight's position -- and we had a
14 declaration available to be tendered to the Court this
15 morning -- that our position is that in these 18 cases, that
16 the legal motions to dismiss -- we call them "Demurrers" in
17 state court procedure in Virginia -- that they were not
18 noticed for a hearing, they were not argued, and that they're
19 not mature for the Court's entry of orders and there's a
20 dispute on that, and Mr. Sexton's declaration indicates that
21 their position is that they were subject to this decision in
22 *Wingate*. Your Honor --

23 THE COURT: Well, isn't this an issue that the Judge
24 down there should decide? I mean, if the Judge, in fact,
25 decided these for all -- with respect to all plaintiffs, but

1 failed -- but somehow they didn't get on the docket, should
2 not that happen if the Judge says -- he decides it? I mean,
3 why should I decide as to what the Judge decided when the
4 Judge can do that directly?

5 MR. BUSCH: Judge Zobel, we think that the issue
6 before the Court is where the jurisdiction of the cases lie at
7 this time. We do not believe that jurisdiction lies in the
8 Circuit Court of Roanoke, given the fact that your memorandum
9 decision granted the trustee's motion on May 15th and --

10 THE COURT: Yes, but until I give an order to
11 transfer, they're there. I mean, I just think -- I'm
12 wondering whether the Judge should not be given an opportunity
13 to be heard on what it is that the Judge thinks he did.

14 MR. BUSCH: Your Honor, I think -- in essence, I
15 think it begs the question of where the jurisdiction lies.
16 When you entered your memorandum decision, you transferred the
17 cases, and it is very well established in the law that we
18 cited in our brief, your Honor, that under the All Writs Act,
19 that this Court has the ability and is authorized to issue an
20 injunction in aid of its jurisdiction.

21 The case that we cited, Judge Zobel, which is
22 directly on point with this particular issue is that where you
23 have the opportunity for the state court to enter a judgment
24 that's inconsistent potentially with the duration of the
25 litigation, that the Court is authorized to move forward and

1 take appropriate action. We think that is the case.

2 Mr. Sexton, apparently, thinks that these are
3 uncontested motions and he even terms it "ministerial."
4 Ministerial, I think, in trying to skirt the jurisdiction
5 issue.

6 Our position is unequivocal, Judge. These are
7 disputed, controverted orders that go to the heart of the
8 case. We do not believe that they have been noticed. We
9 don't think they have been argued, and we don't think it's
10 appropriate for the Court to enter the order.

11 If you allow the Circuit Court of Roanoke to sort
12 this out, there are other motions in other cases that are
13 being transferred from Virginia and you've set up a perfect
14 opportunity for there to be a conflict between the state court
15 order and any future order that this Court enters. If it were
16 true that the parties agree --

17 THE COURT: Why is there a conflict? I'm assuming
18 that these motions to dismiss were denied.

19 MR. BUSCH: Well, your Honor, we are mindful of the
20 fact that you did not authorize the filing of a reply and,
21 therefore, we did not tender a reply to the plaintiff's brief.

22 Mr. Sexton has a detailed declaration. He states
23 unequivocally in that declaration that there was an agreement
24 off the record in chambers with Judge Dorsey that his ruling
25 in one case, *Wingate*, would apply to all the rest of the

1 cases.

2 We were not there, your Honor. McGuire Woods was not
3 counsel for Insight on February 27th of 2013. However, we
4 reached out to Mr. Clinton Shaw of the Bonner Kiernan law firm
5 in Washington, D.C. We shared Mr. Sexton's -- our declaration
6 with him. We asked him, in representing Insight, what is your
7 recollection of what occurred off the record. I have that
8 declaration. We circulated it by email to all counsel
9 yesterday. With the Court's indulgence, I would be happy to
10 tender it to the Court.

11 THE COURT: Well, I would like to have it.

12 (Attorney Busch hands document to the Court.)

13 THE COURT: Now, we have a conflict as to what
14 happened, which is a conflict that I guess you would agree
15 goes to the heart of the case.

16 MR. BUSCH: That's exactly right, Judge, and that's
17 why we believe it should be sorted out here where the cases
18 are now transferred and that the idea --

19 THE COURT: How can I sort it out, short of putting
20 the Judge on the stand and saying what happened?

21 MR. BUSCH: Well --

22 THE COURT: I mean, you believe one lawyer more than
23 another?

24 MR. BUSCH: -- it's interesting, Judge Zobel, because
25 as to your memorandum of decision, the plaintiffs have told

1 you courts only speak through their orders.

2 So, here we have an off-the-record discussion that
3 counsel for Insight says there was no agreement that an order
4 entered and a decision made in one case when only 11 of these
5 18 cases were even filed with the Court would apply for all
6 time in all the other cases.

7 Now, our declaration that my partner Christopher
8 Tribble filed with the Court indicates that the *Wingate*
9 decision doesn't reference these other cases. The order that
10 was entered in *Wingate* doesn't say it applies to any other
11 cases. Furthermore, Judge, there was no order entered that
12 consolidated the cases.

13 So, it's interesting that while they say you can only
14 speak through an order and, therefore, jurisdiction still
15 exists in Roanoke, apparently an off-the-record discussion
16 that's disputed by counsel for Insight -- former client for
17 Insight and our client at this time, that that court doesn't
18 need to speak through its orders.

19 So, we believe, Judge, that having transferred these
20 cases and issued your memorandum of decision, and with the
21 follow-on to that by Insight, Judge, which we did several
22 things. Number one is when Mr. Sexton sought a hearing date,
23 we sent a letter to him saying the cases have been
24 transferred. We suggest that you stand down and ask that you
25 stand down and not move forward. Jurisdiction is now

1 MDL-2419.

2 Second, we filed a notice of assertion of bankruptcy
3 jurisdiction and transfer to MDL-2419 in each of these 18
4 cases. We provided the Roanoke court with a copy of your
5 memorandum and decision. We believe that having granted the
6 motion -- and you used the term "allowed" in there -- that
7 that effectuated a transfer of the cases.

8 We believe that nothing further need be done for
9 these cases to be in Boston other than the administrative
10 issue, which is to the fact that you mention -- you solicited
11 the input of counsel, what needs to be done to follow on to
12 your decision.

13 And as far as we're concerned, Judge, jurisdiction
14 has been transferred and under 28 U.S.C. Section 157(b) (5),
15 the cases are now MDL-2419 and that administratively all that
16 need be done is the entry of an order that requests that the
17 Circuit Court of Roanoke physically transfer the files, but
18 the physical possession of a court file is not equivalent to
19 the concept of jurisdiction.

20 You found, pursuant to the trustee's renewed motion,
21 that there is related-to jurisdiction based upon the filing of
22 a proof of claim by Insight and also based upon the filing of
23 proofs of claim by all 18 of these plaintiffs.

24 So, your Honor, our position is that under the law
25 that we've cited under the All Writs Act, that this Court has

1 the -- all that's necessary in terms of issuing an injunction
2 naming this jurisdiction because the -- there's a lot of
3 litigation left to be done in these cases and it's a game --
4 this isn't a ministerial act, Judge. It's a hotly disputed
5 issue, as you can tell from these declarations, as to whether
6 a single decision in *Wingate* does not say it's pursuant to any
7 agreement or a consolidation and the order that was entered in
8 *Wingate* does not indicate that it was either, that under those
9 circumstances, that we think that this Court should enter the
10 injunction.

11 I would also add, Judge, quickly, mindful of your
12 admonition on the amount of time, that the plaintiffs filed a
13 so-called status report in the Roanoke Circuit Court. There's
14 no pleading in our Title 18 Form of the Code of Virginia that
15 refers to the filing of the status report. There's no rule of
16 the court that talks about the filing of a status report.

17 Mr. Sexton's clients filed this status report in each
18 of these 18 cases and Mr. Sexton directly sent to the Court an
19 exemplar of the status report and in that he said two things
20 that I think are of particular interest, Judge.

21 As to your memorandum and decision, he says, "The
22 Judge in Boston issued her opinion on May 15th, 2014,
23 indicating that she would grant the trustee's motion," that
24 you would. You would. We read your memorandum decision to
25 say unequivocally that you "allowed" the motion. That's a

1 completed act.

2 And the second issue in this so-called status report
3 is that -- and this is at Paragraph 11 where they specifically
4 say -- Mr. Sexton, "Plaintiff believes that this Court still
5 has jurisdiction."

6 Well, your Honor, we think that the Circuit Court of
7 Roanoke does not have jurisdiction. You have transferred the
8 cases. You have sought the input of counsel that has been
9 provided in terms of an orderly process for the court file to
10 be transferred. We filed with each -- with this Court the
11 notice of the assertion of bankruptcy jurisdiction and
12 transfer of these cases and we believe that's all that need be
13 done to notify the local state court that these cases are now
14 in MDL-2419. We believe --

15 THE COURT: What do you say is the meaning of the
16 very last sentence in my opinion which says that, "Counsel
17 shall inform the Court regarding any steps necessary to
18 effectuate the transfer"?

19 MR. BUSCH: Judge, from our perspective -- and we
20 feel 100 percent confident in telling you this. We think that
21 means how do I get the court file. There are 20 court files
22 in the Circuit Court of Roanoke. What needs to be done to
23 notify the clerk to send those court files to us?

24 And I would say one other thing, Judge, and that is
25 that the plaintiffs confuse the concept of Rule 58 in terms of

1 an appealable order with what you have done. The creditor's
2 committee, Mr. Molton, filed an excellent brief with the Court
3 in response to the plaintiffs' filing, making it clear that
4 this is interlocutory. Judge Saylor said it was interlocutory.

5 THE COURT: I'm not concerned about the appeal,
6 frankly. I'm concerned about where we are now.

7 MR. BUSCH: But the --

8 THE COURT: I have two issues. One is whether, in
9 fact, a transfer occurred at the moment I said the motion is
10 allowed.

11 MR. BUSCH: We believe, yes, your Honor.

12 THE COURT: That the motion --

13 MR. BUSCH: You granted the motion.

14 THE COURT: I know you do, but that's one issue to be
15 decided.

16 MR. BUSCH: Yes.

17 THE COURT: Particularly in light of the last
18 sentence about "effectuating transfer."

19 And the other issue is who should decide whether, in
20 fact, the Virginia Judge made the ruling with respect to all
21 plaintiffs or not?

22 MR. BUSCH: Judge, again, I think that -- that
23 because you granted the motion --

24 THE COURT: I understand that.

25 MR. BUSCH: -- and you found that there's related-to

1 jurisdiction, that at that point in time that -- and I believe
2 that the trustee's position is the same. We certainly
3 contacted the trustee yesterday and spoke with him -- that
4 this is a self-effectuating order or decision --

5 THE COURT: So, what happens next? Assuming you're
6 right. What happens next? The cases come here and the
7 plaintiffs will say that the motion to dismiss was denied and
8 you're going to file another motion to dismiss and the
9 plaintiffs are saying it's already been decided by the court
10 in Virginia.

11 MR. BUSCH: Judge, the first thing --

12 THE COURT: So, what do I do? I bring the Judge up
13 here and put him on the stand?

14 MR. BUSCH: Judge Zobel, the first thing that's going
15 to happen is already on the way, and that is that Insight is
16 in discussions with the creditor's committee about
17 participating in the mediation.

18 So, this -- keep in mind that we're backing up all
19 the way to Judge Dorsey entering -- issuing a letter opinion
20 on October 31 of 2013 and entering an order in November.

21 Why do you think, Judge Zobel, that after all of
22 those months pass, you issue your opinion or your memorandum
23 of decision and, all of a sudden, lickety-split, the
24 plaintiffs are racing to Roanoke to try to get orders entered.
25 They had no problem having other orders --

1 THE COURT: You're arguing the substance of this
2 issue. That is that I should disregard their suggestion that
3 the Judge had decided this question but just hadn't been
4 docketed. That's how I understand the plaintiffs' position.
5 And you're just saying, well, you know, you decided it, in
6 essence, or it wasn't decided.

7 MR. BUSCH: Judge, I think that any substantive
8 ruling on these cases from this point -- or, actually, from
9 the point of the issuance of your memorandum of decision, we
10 think should be in MDL-2419, and if the Circuit Court of
11 Roanoke has jurisdiction to issue a decision on these 18
12 cases, as the plaintiffs have presented, does that mean that
13 there's jurisdiction for depositions to go forward? Does that
14 mean that there's -- we certainly had deposition dates that
15 have been reserved.

16 THE COURT: Okay. Let me hear from other counsel.

17 MR. BUSCH: Thank you.

18 THE COURT: Who wants to argue next?

19 MR. SEXTON: Your Honor, this is Scott Sexton. If I
20 may speak, I would like to address these issues.

21 THE COURT: Did you hear the recent colloquy with Mr.
22 Busch?

23 MR. SEXTON: Yes, your Honor, I heard every word of it.

24 THE COURT: Okay.

25 MR. SEXTON: And I'm prepared to address it.

1 THE COURT: Tell me, Mr. Sexton, why the May 15th
2 opinion did not effect the transfer right then and there.

3 MR. SEXTON: Well, your Honor, we believe that like
4 every other memorandum opinion that's issued by courts every
5 day and it expresses the reasoning of the court, it expresses
6 a decision by the court and it lets the parties and the
7 appellate court know the rationale for that decision.

8 It is informative and it was informative to us. It,
9 however, is not an order, and the court speaks for its order,
10 and we cited First Circuit cases that establish that the First
11 Circuit is just like the Fourth where I practice, and that is
12 absolutely required.

13 We cannot imagine how a memorandum decision would
14 ever be considered an order in and of itself. We received
15 your order. We took it to be what it was, a memorandum
16 decision issuing an opinion that was contrary to our asserted
17 positions, but also asking for the parties to provide guidance
18 as to how it should be effectuated, and then we did provide
19 that guidance by subsequent filing.

20 So, that is -- we view it as any other memorandum
21 opinion and I think it's only due to an overzealous desire to
22 have it effectuated immediately, that someone, you know, as
23 skilled as Mr. Busch would argue that it is somehow an order
24 as well. It's not an order. So, we have shown no disrespect
25 to this Court and we intend to show no disrespect to this

1 Court, but --

2 THE COURT: So what, Mr. Sexton, is your view of the
3 status of the cases in Virginia?

4 MR. SEXTON: Okay, your Honor. In that regard, I
5 think it's unfortunate that you're missing Pages 2 and 3 of my
6 declaration, but --

7 THE COURT: You said you had filed them.

8 MR. SEXTON: -- on Page 5 of the declaration, it sets
9 out the three categories of outstanding orders that are needed
10 in Roanoke. There are ten cases that require orders denying
11 leave to amend requests for admissions and denying
12 reconsideration of partial summary judgment. Those were all
13 noticed and heard and are awaiting order. The Judge has
14 already indicated his ruling on that vis-à-vis the *Wingate*
15 opinion.

16 So, that is -- those have been noticed and heard and
17 argued, and there's no argument, as Insight advances on
18 another category, that they were never noticed.

19 The second category is --

20 THE COURT: What does being "noticed" mean? I mean,
21 are they part of the -- have they been recorded in some way?
22 I mean, I understand there was a decision in the *Wingate* case.
23 Has that decision by a written order been made applicable to
24 all of the other cases?

25 MR. SEXTON: No. That is the point. They were all

1 argued on the same day.

2 When I say "pursuant to written notice" -- in
3 Virginia procedure we typically, although we are not required
4 to do so in every instance, provide a notice that alerts the
5 Court as to what case is going to be called when we arrive for
6 the hearing.

7 THE COURT: And what cases did that order include?

8 MR. SEXTON: Well, in this instance, these were
9 noticed on that first category in all eleven cases that were
10 at issue and --

11 THE COURT: Now, the opinion apparently has only
12 "Wingate" in the title. Was that decision in any way
13 docketed?

14 MR. SEXTON: The *Wingate* decision was docketed in the
15 *Wingate* case. And, otherwise, the orders need to be entered
16 as to these other issues.

17 And I would mention that Insight's motion does not
18 affirmatively take issue with any aspect of this category of
19 orders. They only talk about the orders on Demurrers, which
20 are motions to dismiss, that they filed. So, they have not
21 complained about my first category, which is a very
22 substantial category that we've asked the Roanoke court to
23 deal with.

24 THE COURT: And what's that?

25 MR. SEXTON: Pardon me?

1 THE COURT: What category?

2 MR. SEXTON: The first category -- the first category
3 of orders that are outstanding, which is on Page 5 of my
4 declaration, Paragraph 18(A), the ones that deny Insight's
5 motion for leave to amend admissions and to reconsider partial
6 summary judgment that's been granted against it.

7 So, that's one category on which Insight has advanced
8 no contrary argument. They have not briefed and they have not
9 asserted any position that those were not fully briefed and
10 argued in court.

11 THE COURT: Yes, but were they decided? I mean, my
12 problem is I don't understand what the Judge did.

13 MR. SEXTON: Well, the issues are identical in each
14 case.

15 THE COURT: Yes, but just because one case is
16 decided, if an identical issue comes up, are you saying that
17 the decision in one case automatically without more applies to
18 all the other cases?

19 MR. SEXTON: Your Honor, what I'm saying is that in
20 this instance, all of the issues were identical and they were
21 all argued on the exact same day.

22 THE COURT: But orders were -- an order was only
23 entered in one case.

24 MR. SEXTON: Right. And that was due to our neglect.
25 I mean, that's simply a housekeeping matter. The Judge

1 certainly indicated -- I mean, believed he was ruling on all
2 ten.

3 THE COURT: How do we know that? How do we know
4 that?

5 MR. SEXTON: Because we began this whole process,
6 your Honor -- if I go back to my declaration, which Mr. Busch
7 takes issue with, but --

8 THE COURT: I have it here. Page 5 you're looking
9 at?

10 MR. SEXTON: Oh, my declaration. I'm now describing
11 on Page 2, 2 of the declaration.

12 THE COURT: Well, Page 2 is one of those I think I
13 don't have.

14 MR. SEXTON: You would have it on 1161.

15 COURTROOM DEPUTY CLERK URSO: Judge, do you want me
16 to print this?

17 MR. SEXTON: All right. Your Honor, let me just
18 briefly summarize what happened.

19 When we arrived in court on February 27th -- and this
20 is on the record at the end of the hearing -- the Court
21 explained to us that they had lost two judges in the circuit
22 and that these were going to require some procedural and
23 administrative issues, which he invited us back to talk about,
24 and he said there was no need to do it on the record. He
25 wanted to do it off the record.

1 So, we all go back, all counsel go back -- and, by
2 the way, my recount of this is contained in the declaration
3 and I also sent this declaration to counsel for the other
4 three defendants, IGPM and the two doctors, days ago, days
5 before I filed it, and I asked them to verify it and make sure
6 that it was consistent with their recollection. They
7 confirmed that by email to me. And so, I have a great deal of
8 confidence that my memory on these issues is correct.

9 Having prefaced his statements with the fact that the
10 Court was down -- understaffed now by two full-time judges, he
11 asked us to try to be efficient in this case. We explained
12 that we would have 18 or 19 identical cases. He explained
13 that he was going to be the judge on all the cases that we
14 filed, Gentry Locke, and all the other meningitis filed that
15 were filed in Roanoke Valley.

16 He explained also that because they were short
17 staffed, he was going to need us to help him be efficient as
18 the judge on these things.

19 Now, the declaration by Mr. Shaw tries to assert that
20 this was only about discovery issues. I would say that that
21 does not pass the common sense test because obviously the
22 Court is not worried about how we conduct discovery.
23 Certainly, we may have talked about discovery at that time,
24 but the reason the Court invited us back was because he was
25 concerned about his docket and how he could be efficient. At

1 that point in time --

2 THE COURT: By mucking up my docket.

3 MR. SEXTON: Pardon me?

4 THE COURT: No, nothing.

5 MR. SEXTON: At that point in time we proposed that
6 we would handle matters in a way that was very efficient and
7 did not require duplicate actions by the Court.

8 Again, this is very consistent with common sense.
9 When you have 18 identical cases, twelve as of that day, but
10 we had informed him we were going to have another six or seven
11 that were being filed imminently and, of course, the Court is
12 not going to want to hear 18 or 19 separate motions on the
13 same identical hearing. I'm talking about identical facts
14 pled in the complaint and identical Demurrers filed by the
15 defendants. So, that is the context in which this arose.

16 Now, when the *Wingate* opinion did come out -- I
17 notice that Mr. Shaw's declaration says after Judge Dorsey's
18 ruling, Insight did not agree to entry of orders in the other
19 18 cases.

20 That may be true in his memory, but if lead counsel
21 at that time, whose name is Heather Dean, asked me in the
22 presence of counsel for the other defendants if we were going
23 to file all 19 amendments at the same time, all 19 amended
24 complaints, and they expressed their concern that that would
25 be overwhelming. We all agreed as three groups of counsel not

1 to do that.

2 So, while he may in his mind be able to justify
3 saying that there were -- there was no agreement -- they
4 certainly asked me if I was going to file all 19 amendments at
5 the same time, and I would say that certainly implies that
6 they were confirming the understanding we had with the Court
7 at the very beginning, that these matters would be handled in
8 an efficient way so that the Court would not have to have
9 serial hearings on the same exact issue in each case.

10 THE COURT: Excuse me, Mr. Sexton.

11 How do I decide what you have now created as a
12 question of fact? How do I decide this?

13 MR. SEXTON: Well, your Honor, I believe your
14 inclination to have Judge Dorsey in Roanoke, Virginia review
15 these things just for the purpose of entering orders where he
16 believes he has already ruled on the issues of substance --

17 THE COURT: Well, I don't know what he believes,
18 frankly, but defendants certainly don't think that they argued
19 all 18 cases or that the argument on *Wingate* applied to all
20 18. And to the extent that the Judge signed his *Wingate*
21 opinion, but then did nothing with the other 18, what's the
22 significance of that?

23 I mean, the main question I have is both of you are
24 raising an issue of fact as to what the Judge down there did,
25 and unless I agree with Mr. Busch that my opinion effected a

1 transfer immediately, the issue still has to be decided before
2 the transfer can take place, I think, unless I short circuit
3 and say transfer, okay, now.

4 MR. SEXTON: I believe that -- if I could go back to
5 what I was walking you through initially, which is that there
6 are two -- I mean, there are three categories of these orders,
7 and the second category are the Demurrers by the defendant
8 IGPM, the other defendant. I've spoken with those counsel.
9 They fully agree that the orders should be entered in all
10 those cases because the Judge has already decided them.

11 THE COURT: What counsel?

12 MR. SEXTON: So, they have no -- that's not even this
13 defendant who is complaining to you. That's the other group
14 of --

15 THE COURT: Who agreed -- excuse me, Mr. Sexton.

16 Who agreed that the other -- that there should be
17 docket entries as to all?

18 MR. SEXTON: Counsel for Image Guided Pain Management
19 agreed with me on the phone last week --

20 THE COURT: But that's not this defendant.

21 MR. SEXTON: But that is one of the categories of
22 orders that needs to be administratively answered, and that is
23 my point.

24 THE COURT: Okay. Is there anything else that you
25 wish to add?

1 MR. SEXTON: Yes.

2 THE COURT: Quickly.

3 MR. SEXTON: As to the third category of orders, they
4 are the motions to dismiss filed by this defendant and as to
5 those, we believe we have set out why those issues have
6 already been decided, but that is, again, just --

7 THE COURT: Those are not before me, are they? Those
8 particular cases are not now before me, are they?

9 MR. SEXTON: They are not before you, but those are
10 the ones that animate the motion that has been filed by
11 Insight.

12 As to the larger points, your Honor, I believe the
13 most important thing for you to understand in this motion is
14 that there is no emergency to this Court's jurisdiction, which
15 is the way that Insight had to cloak its motion in order to
16 plausibly bring it to you as an emergency injunction against
17 attorneys and plaintiffs 700 miles away. Under that standard
18 for the Anti-Injunction Act, it has to be absolutely necessary
19 in aid of this Court's jurisdiction. It is very limited.
20 It's very narrow and it's very strictly construed.

21 And the plaintiffs' steering committee has joined in
22 and supports the notion that the Roanoke court should be
23 allowed to handle what it -- this housekeeping issue and enter
24 appropriate orders that it believes it has already decided.

25 There is no emergency. We gave 47 days' notice

1 before we selected the hearing date that Insight chose for the
2 presentment hearing, and as an accommodation of that, I won't
3 even be there. I'll be out of the country.

4 We also advised this Court at the same time that we
5 were presenting orders to the Roanoke court. There has no
6 rush and there has been nothing but transparency.

7 I believe that the absolute foundation for Insight's
8 argument rests on the false underpinning that the May 15th,
9 2014 decision by this Court is an order. It accomplishes the
10 exclusive jurisdiction. It accomplishes removal and transfer
11 all in one package, and it is precisely not any of those.

12 So, here presentment to the Roanoke court would aid
13 this Court and would aid any court to know what the Roanoke,
14 Virginia Judge has already decided about Virginia state law
15 issues.

16 So, I think in this sense, Insight is picking a fight
17 with the Roanoke court when none is needed and certainly no
18 need has been demonstrated.

19 If Insight is correct, just play it out and Insight
20 is correct in all that it says, then -- and this Court has
21 already done all the things that Insight heaps onto the
22 decision on May 15th, then an order by the state court in
23 Roanoke is meaningless and it would be void, in any event.
24 Certainly, no one needs to be enjoined.

25 So, we tried to lay these out as best we can in our

1 papers on short notice. Again, I direct your attention to
2 Pages 2 and 3 of our declaration and also particularly to the
3 plaintiffs' steering committee's response, which I believe
4 brings a very common sense and pragmatic approach to this.

5 So, your Honor, with all of -- for those reasons, we
6 just respectfully request that the emergency motion be
7 declined.

8 THE COURT: Okay. Who would like to be next, Mr.
9 Sobol, Mr. Gottfried or Mr. Molton?

10 MR. SOBOL: May I, your Honor? Is that all right?

11 MR. MOLTON: Go ahead, Tom.

12 MR. SOBOL: Thank you. Good morning, your Honor.
13 I'll try to be brief.

14 THE COURT: For those on the phone, Mr. Sobol for the
15 plaintiffs' committee is speaking.

16 MR. SOBOL: Thank you.

17 The threshold issue is whether or not your memorandum
18 opinion effectuated the transfer right then and there. The
19 only two things I'll add is this:

20 First, of course, you at the end of a very thorough
21 memorandum indicate that you want guidance from the parties as
22 to how to effectuate it. I think you couldn't be more clear
23 as a result of that, that it's not self executing. I think if
24 we peel behind that, though, there are reasons why it's not
25 self executing. The parties had briefed the issue of

1 jurisdiction. Is there related-to jurisdiction? Is there
2 ascension that's necessary?

3 The parties had not briefed -- I'm going to make an
4 effort to educate the Court regarding tricky issues, frankly,
5 in these circumstances.

6 How does the case get removed? How do we effectuate
7 it? We look at the jurisdictional statute. I mean, there are
8 many cases in federal court where the federal court has
9 jurisdiction that is not exclusive to the state courts and
10 where even though the federal court has jurisdiction over it,
11 for some reason or another, the case hasn't been properly
12 removed or something like that in a timely way and the state
13 court simply goes forward.

14 And if you look at these statutes, they're tricky
15 right now, which is why the PSC has -- we've punted on these
16 issues for a couple of days. We filed a memorandum regarding
17 what the Court should do on this.

18 THE COURT: I noticed that.

19 MR. SOBOL: Well, because -- you know, you look at --
20 there's a jurisdictional statute. It only tells you about
21 jurisdiction. You look at 157(b), it sort of looks like it's
22 transferring things within the federal court system, and you
23 sort of say to yourself how is this going to work. So, I just
24 don't think that the memorandum can be looked at as being self
25 executing, number one.

1 The second thing is that the PSC looked hard at the
2 declarations and at the emails that Mr. Sexton sent us from
3 other defense counsel to at least make sure that there wasn't
4 some kind of monkey business going on here. We would not, in
5 other words, want to be a part of something if there were
6 state court lawyers trying to effectuate some kind of
7 substantive ruling, you know, behind the scenes or without any
8 kind of transparent way and try and basically get away with
9 something.

10 We're not saying that Mr. Sexton is right and the
11 other guys are wrong. We don't know that, right. But we just
12 didn't know that -- more than passes the smell test. In fact,
13 Mr. Sexton's declaration has a ring of truth to it in the
14 sense that you have lawyers trying to be practical with an
15 overburdened state court system, moving forward and not doing
16 a bunch of ministerial things, like filing amended complaints,
17 to then have Demurrers filed on them, to then have the Court
18 issue the orders, because Mr. Sexton is getting ready for the
19 trial of the *Wingate* matters and the lawyers want to spend
20 their time dealing with that, and there are many situations,
21 frankly, and I think that Mr. Sexton is overdoing it, you
22 know. I don't think it's neglect. Although in retrospect, it
23 might be neglect, but there are lots of things that are just
24 sort of practical rule of law taken care of, you know, the
25 details don't get followed through.

1 But my final point is simply this:

2 If you allow the state court judge to determine
3 whether or not he should enter these rulings or not, you will
4 at least have that information, when and if these cases get to
5 you. If you don't, then you won't know what was intended, at
6 least by the state court judge.

7 Also, there's a little bit of irony here. Even if
8 these cases are brought up right now and we don't have any of
9 this procedural mishegas going on and the Demurrers are before
10 you or the question as to whether or not the admission by
11 these defendants that they are not healthcare providers and,
12 therefore, aren't subject to any medical malpractice caps,
13 that's the kind of question which you might say, Well, gee,
14 why don't we go ask the state court judge what he thinks about
15 the -- you know, the strengths of the state law claims or
16 whether or not these things that were stated to him or filed
17 in his court should bind you. So, you'd probably be asking
18 him, anyway.

19 So, I think the practical thing is -- oh, and also,
20 by the way, if you do let this go forward and if the Judge
21 does enter an order one way or another, you'll still be able
22 to revisit it here as to whether or not there are some
23 shenanigans that went on in connection with that or not.

24 So, I just think that the practical solution to --
25 oh, then also this: Your memoranda asks for guidance as to

1 what you should do under these circumstances. My view would
2 have been -- before this whole hullabaloo came along, my view
3 would have been, well, does the state court judge have any
4 tidying up of his docket to do before it gets here?
5 Particularly if there are things that are not yet finished and
6 which the Court might -- it might help the Court be educated
7 about what happened there. So, my position would have been,
8 if there's any housekeeping to be done, let the couch be
9 cleaned before it gets sent here, anyway.

10 THE COURT: Thank you. Mr. Gottfried or Mr. Molton.

11 MR. GOTTFRIED: Thank you, your Honor. Michael
12 Gottfried for the trustee, Paul Moore.

13 Your Honor, you posed two questions. The first
14 question is: What was the impact of your order?

15 The trustee attempted to answer that question with
16 its proposed supplemental order, which was Docket 1137. In
17 that proposed order, which was in response to the last
18 sentence of your ruling, we suggested that you grant the
19 motion effective as of May 15th, 2014, and our position is you
20 have the power to do that, and we urge you after you have a
21 chance to consider our order to enter it. We think that that
22 is the appropriate way to effectuate your memorandum of
23 decision pursuant to 28 U.S.C. 157(b)(5).

24 THE COURT: And leave any disputes about what
25 happened in Virginia in Virginia? Or maybe it will come

1 along.

2 MR. GOTTFRIED: As to your second question, the
3 trustee really expresses no opinion. We weren't there. We
4 don't know what happened. We think the parties have presented
5 that to you for decision and obviously you will have to decide
6 that issue.

7 But our dog in this fight is we would like to get
8 these cases here as soon as possible. We'd like you to
9 consider our proposed order and enter it so we can proceed
10 forward in the MDL.

11 You heard that there's a great interest, perhaps, in
12 mediation. We would like to get those cases here and get
13 going with that just as soon as we can, and obviously no
14 position on what happened in Roanoke. We weren't there.
15 Thank you, your Honor.

16 THE COURT: Mr. Molton.

17 MR. MOLTON: Your Honor, I'm not going to repeat what
18 Mr. Gottfried said, but a number of things.

19 We, again, join Mr. Gottfried in urging the Court
20 enter an order as soon as possible. We leave it to your Honor
21 in that order whether to leave it to the Virginia Judge or not
22 or to yourself to deal with certain, as Mr. Sobol said, house-
23 cleaning items, but I do want to make an important point.

24 Without divulging confidential discussions, there is
25 significant interest in getting these parties into mediation.

1 That has to happen sooner rather than later. We've got
2 planned discussions coming down the line over the summer. It
3 is the intent of the trustee and the committee to see if we
4 can file a disclosure statement with a plan by the end of the
5 summer, end of August, early September.

6 Any delay on not only this case, but other cases,
7 creates a number of ripples that delays the ultimate. So,
8 what we're concerned about, looking at how your Honor
9 formulates the order, is that -- we're informed by Mr. Sexton
10 that there is a hearing now for June 27th. I wish that
11 hearing would have been earlier in Virginia so that if your
12 Honor was inclined for the Virginia Judge to deal with these
13 issues, it could be dealt with and the cases could be
14 transferred.

15 THE COURT: This is a hearing on what?

16 MR. MOLTON: My understanding is there is a
17 conference in front of the Virginia Judge on this matter that
18 has been set by Mr. Busch on behalf of his clients as well as
19 by Mr. Sexton on behalf of his clients for June 27th.

20 Our fear from the committee -- and I'm presuming that
21 the trustee will join with us -- is that that will create
22 ancillary litigation that would drag on the summer.

23 So, to the extent that these issues, you know -- and,
24 as Mr. Sobol said, you know, let the Virginia Judge do
25 housekeeping. We're also fearful that -- what that term

1 means, because the term "housekeeping" can be a loophole
2 through which armies can march and issues that aren't even
3 discussed here can be presented.

4 So, we're urging your Honor in formulating an order,
5 and if your Honor decides to let the Virginia state court
6 Judge deal with this, to be very exact in exactly what has to
7 be dealt with and the timeframe with which that should be
8 dealt with, because, as Mr. Gottfried says, it's in the
9 interest of all the victims to get these cases here in front
10 of you as soon as possible.

11 And just one point that Mr. Sobol raised that goes
12 to, really, Mr. Sexton's reconsideration motion that really
13 isn't teed up for today. I know that the trustee and the
14 committee wanted to file --

15 THE COURT: I've had some briefing on that. Motion
16 for reconsideration is denied.

17 MR. MOLTON: Thank you.

18 In any event, Judge, I just wanted to say that these
19 -- the issue of transfer pursuant to 157 isn't rocket science.
20 Article III judges deal with them all the time, effectuating
21 orders that transfer cases from state courts to their courts,
22 most of the time MDL's like this Court. It's done all the
23 time. It's not unusual. And we have full faith that your
24 Honor will be able to craft an order in accordance with the
25 trustee's proffered order that will do that. Thank you.

1 THE COURT: Thank you.

2 Is there anyone on the telephone who needs to be
3 heard? Needs to be heard.

4 (No response.)

5 THE COURT: I take that silence as nobody.

6 Mr. Sobol, you didn't want to anything, did you?

7 MR. SOBOL: Well, I just wanted to make it clear,
8 your Honor, that it's the PSC and the Roanoke plaintiffs and
9 the creditor's committee and the trustee and Insight who are
10 all getting ready to participate in the mediation. The issues
11 before you have nothing whatsoever to deal with in terms of
12 whether there's mediation or the timing of it.

13 THE COURT: You mean if the cases stay in Virginia,
14 there will still be mediation?

15 MR. SOBOL: Of course, there will.

16 THE COURT: Okay.

17 MR. SOBOL: Your Honor, unless Insight decides it
18 doesn't want to for some reason, right? The plaintiffs are
19 ready to -- you know, the plaintiffs would like to have a
20 mediation, right, just like you do in every other mass tort
21 when there are state cases and there are federal cases. It's
22 got nothing to do with this, and whether the Judge takes this
23 up tomorrow or the end of June, we're ready to roll.

24 THE COURT: Okay. Mr. Busch, you can have one
25 minute. That's all.

1 MR. BUSCH: Your Honor, this is not a housekeeping
2 matter.

3 Second, the notices of hearing are crucial. The
4 February 27th hearing, there were no notices of hearing as to
5 Insight. The --

6 THE COURT: I think you've told me that.

7 MR. BUSCH: The *Wingate* case was the only one noticed
8 for that day and had been removed.

9 Your Honor, Mr. Sexton went through several different
10 categories of orders. There is no reason why if our co-
11 defendants don't object to the entry of an order, that they
12 can't just present an order to this Court based upon the
13 transfer of the cases. So, there's no immediacy with respect
14 to our co-defendants.

15 If they believe that the Court has made a decision,
16 fine, you can enter into a consent order and that can be
17 entered in the MDL, but, your Honor, this is a hotly contested
18 issue. There are 128 plaintiffs. There are 30 cases. There
19 are many cases in which the Demurrers have not been argued.
20 There is a dispute on whether this *Wingate* ruling should be
21 applied to these other 18 cases. If you allow this to go
22 forward with Judge Dorsey, you're setting this Court up for
23 the opportunity for inconsistent rulings.

24 We do intend at some point, if we don't resolve the
25 cases through mediation, to bring these motions on in the

1 other cases that have been transferred pursuant to your order.

2 Again, there are 30 cases. There are 128 plaintiffs,
3 and you just simply have to ask yourself -- and I know you
4 have -- why -- if this order was entered in *Wingate* in
5 November and there have been other hearings, why is there no
6 record that there was an agreement or a decision by Judge
7 Dorsey that his ruling in *Wingate* would apply?

8 THE COURT: Okay.

9 MR. BUSCH: Courts speak through their orders, your
10 Honor, and I think that it's important to note that there is
11 no documentation of this putative agreement.

12 THE COURT: Thank you all. I will take the papers
13 and give you as fast a decision as I can manage.

14 MR. MOLTON: Your Honor, can I raise one issue?

15 Your Honor just on the record denied the motion for
16 reconsideration. I want to be clear. The motion was for
17 reconsideration and a stay pending appeal. Is the motion for
18 stay pending appeal --

19 THE COURT: The stay is denied. The motion for
20 reconsideration is denied.

21 MR. MOLTON: Thank you.

22 THE COURT: Of course, counsel can go to the Court of
23 Appeals and seek a stay there.

24 MR. SOBOL: Thank you, your Honor.

25 THE COURT: Thank you all.

1 MR. MATULE: Thank you.

2 MR. BUSCH: Thank you, your Honor.

3 (Adjourned, 10:28 a.m.)

4
5
6 C E R T I F I C A T E

7 I, Catherine A. Handel, Official Court Reporter of
8 the United States District Court, do hereby certify that the
9 foregoing transcript, from Page 1 to Page 40, constitutes to
10 the best of my skill and ability a true and accurate
11 transcription of my stenotype notes taken in the matter of No.
12 13-md-2419-RWZ, In Re: New England Compounding Pharmacy, Inc.,
13 Products Liability Litigation.

14
15
16 June 8, 2014
17 Date

/s/Catherine A. Handel
Catherine A. Handel, RPR-CM, CRR